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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 211

CITIES SERVICE OIL COMPANY,
Petitioner,

vs.

WALTER N. TOBRINER, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE H. COLIN
Counsel for Petitioner
60 Wall Street
New York 5, N. Y.

Of Counsel:
EDWIN J. GORDON
JACK B. JOEL
ROBERT W. THABIT
60 Wall Street
New York 5, N. Y.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Cities Service Oil Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on May 31, 1962.

Opinions Below

The decision of the United States District Court of June 28, 1957, which originally dismissed the plaintiff's complaint *sua sponte*, before answer and without a trial, is unreported. (Infra, app. p. 64A). The decision of the Court of Appeals of May 29, 1958, affirming such order of dismissal, is unreported. (Infra, app. p. 65A to 66A). The decision of the Court of Appeals of September 10, 1958, granting a rehearing of its opinion and order and

remanding the case to the District Court "with directions to grant a preliminary injunction and to hold a hearing on the complaint and decide whether appellant must have a general agent in the District of Columbia in order to qualify for a license", is unreported. (Infra, app. p. 67A). The decision of the District Court of October 3, 1960, on remand granting summary judgment in favor of respondents, is unreported. (Infra, app. p. 68A). The Court of Appeals' reversal and remand to the District Court of May 25, 1961 is reported at 292 F. 2d 759. (Infra, app. p. 69A to 70A). The petitioner's motion for rehearing and the denial by the Court of Appeals of July 18, 1961 is unreported. (Infra, app. p. 71A). The final dismissal of plaintiff's complaint by the District Judge, *sua sponte*, on remand and the order for stay of November 27, 1961, are unreported. (Infra, app. p. 72A to 73A). The Court of Appeals order granting a stay of December 7, 1961 is unreported. (Infra, app. p. 74A). Affirmance of the dismissal of the complaint by the Court of Appeals on May 31, 1962 is as yet unreported. (Infra, app. p. 75A to 76A). The Court of Appeals of June 12, 1962 staying the mandate is unreported. (Infra, app. p. 77A). On June 22, 1962 The Court of Appeals' order denying petitioner's application for an injunction to restrain respondents from restricting or interfering with appellant's importation and delivery of motor vehicle fuel in the District of Columbia pending an application for a writ of certiorari of June 21, 1962 is unreported. (Infra, app. p. 78A).

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 31, 1962 (Infra, app. p. 75A). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

I.

Has there not been a departure from the accepted and usual course of judicial proceedings amounting to a denial of due process when a case is dismissed, *sua sponte*, without challenge of the sufficiency of the complaint and without trial and without disposition of a constitutional question raised with respect to the application of a provision of the District of Columbia Code and of a Régulation promulgated thereunder?

II.

Where, as in this case, the administrative agency predicated its administration of the licensing statute solely on the requirement that foreign corporations have a resident general agent in the District, did not the Court of Appeals depart from the judicial function and enter the administrative when, after holding such requirement to be invalid, it suggested a new administrative requirement which had at no time been imposed by the District, with the result that the District thereafter wrote such requirement into its procedure and denied petitioner a license on the ground suggested by the Court of Appeals?

III.

Where a case is litigated throughout on a single issue framed by the parties and the Court of Appeals—"whether appellant must have a general agent in the District of Columbia in order to qualify for a license"—and such issue is decided favorably to appellant, and the Court then utters a clear *obiter dictum* by expressing a requirement—that the appellant must have a local

office or place of business in the District in order to qualify for a license—which was at no time contended or litigated; does such *obiter dictum* constitute "the law of the case" in a later appeal and bind the Court and the parties?

Constitutional Provisions, Statutes and Regulations Involved

Amendment V to the Constitution of the United States is as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 3 of the Act of April 23, 1924, the Motor Fuel Tax Law, 43 Stat. 107, ch. 131 as amended by Section 3, Title III of the Act of August 17, 1937, 50 Stat. 677, ch. 690, Section 47-1903(a) and Section 47-1916 D. C. Code (1961), provides, in pertinent part, as follows:

> "Sec. 3(a) No person shall bring into, or produce, refine, manufacture, or compound in the District of Columbia motor-vehicle fuel to be used by him or to be sold, bartered, delivered for value, or exchanged for goods, and no person shall engage in the business of importer of motor vehicle fuels in the District of Columbia unless such person is the holder of an unrevoked license authorizing him so to do issued by

the Commissioners. The application for such license shall contain (1) the name of the applicant; (2) the name under which the applicant intends to transact business and the name and place of business of the local representative; (3) the location of the applicant's place of business; (4) the date such business was established; and (5) any other information required under regulations promulgated by the Commissioners of the District of Columbia. In case the applicant is a corporation, the application shall also contain the corporate name, place and time of incorporation, and the names of the officers and directors, and, if a foreign corporation, the name of its resident general agent, and in case the applicant is a partnership the names and addresses of the several persons constituting the partnership. Such application shall be signed and sworn to by the owner of such business, if owned by an individual; by the partners, if owned by a partnership; or by the president and secretary of the corporation, or by its manager or resident general agent, if owned by a corporation. * * *"

"Sec. 47-1916. Commissioners to Make Necessary Regulations.

"The Commissioners may make such regulations as in their judgment are necessary for the administration of Section 47-1901 to 47-1916. * * *"

Article 26 of the Police Regulations for the District of Columbia provides as follows:

"Sec. 2—Every licensed importer shall designate a local representative and maintain a local office or place of business within the District of Columbia. * * *"

Statement of the Case

The complaint (Infra, app. p. 1A to 4A) sought an injunction restraining the respondents from restricting or interfering with the petitioner in the importation and

distribution of motor fuel in the District of Columbia subsequent to June 30, 1957 and a declaratory judgment to the effect that under Section 47-1903, D. C. Code (1951 Edition) the petitioner is not required, as contended by respondent upon the denial of petitioner's application for license, to designate and maintain a resident general agent in the District of Columbia as a condition of obtaining a motor fuel importer's license.

The petitioner, a long-time holder of a motor fuel importer's license, filed an application with the respondents for a motor fuel importer's license for the year commencing July 1, 1957 and tendered the required fee and stood ready to furnish the necessary surety bond. The application, submitted on respondent's form, stated that petitioner did not have a resident general agent and set forth the name of the petitioner's agent for the service of process in the District of Columbia (Infra, app. p. 14A to 20A).

On June 13, 1957, the respondents rejected petitioner's application for the renewal license on the sole ground, reiterated four times prior to suit, that petitioner did not set forth in its application the name of its "resident general agent" in the District of Columbia (Infra, app. p. 6A to 11A).

As may be seen from Exhibits "A", "B", "C" and "D" attached to the answer of respondents in this case (Infra, app. p. 6A to 11A), the respondents' refusal to issue a license to petitioner was communicated by them to it in pertinent part as follows:

> "A foreign corporation must report a bona fide resident general agent in the District of Columbia. A registered agent for the service of process only is not a resident general agent." (Exhibit "A" of

answer, letter of May 9, 1957." (Infra, app. p. 6A to 7A):

* * *

"Section 47-1903 (D. C. Code) reads in part, as follows: * * * and, if a foreign corporation, the name of its resident general agent * * *"

"Question 12 requesting name of the resident general agent shows—

"NONE—Limited Agent—United States Corporation Co., 1111 National Press Building, Washington, D. C.

"It will be necessary to show the name and address of a resident general agent authorized to transact any business in the District of Columbia before a license can be issued." (Exhibit "B" to answer, letter of June 6, 1957) (Infra, app. p. 8A to 9A).

* * *

"In this letter we have requested you to show the name and address of a resident general agent authorized to transact any business for the company in the District of Columbia before a license can be issued." (Exhibit "C" of answer, letter of June 11, 1957) (Infra, app. p. 9A to 10A).

* * *

"The application is rejected for the following reasons previously outlined in our letter of June 6, 1957 and June 11, 1957:

"Section 47-1903 (D. C. Code) reads in part as follows: * * * and, if a foreign corporation, the name of its resident general agent * * *.

"Question 12 requesting name of the resident general agent shows—

"None—Limited Agent—United States Corporation Co., 1111 National Press Building, Washington, D. C.

"It will be necessary to show the name and address of a resident general agent authorized to transact any business in the District of Columbia before a

license can be issued." Exhibit "D" of answer, letter of June 13, 1957. (Infra, app. p. 10A to 11A).

The issue of this case was framed by the Court of Appeals in its decision of September 10, 1958, the first appeal herein, where, in remanding the case to the District Court, it stated:

> "* * * This case be and it hereby is remanded to the District Court with directions to grant a preliminary injunction and to hold a hearing on the complaint and decide whether appellant must have a general agent in the District of Columbia in order to qualify for a license."

The respondents themselves similarly posed the issue in the following words in their brief filed on the second appeal:

> "Appellees' Statement of Question Presented
>
> "Was not appellant, as a condition precedent to the approval of its application for motor vehicle fuel importer's license, required to designate a resident general agent and state in the application the name and address of such resident general agent?"

After the Court of Appeals in the first-mentioned appeal remanded the case to the District Court for a hearing, that court on October 3, 1960 granted summary judgment in favor of the respondents which, on May 25, 1961, was reversed by the Court of Appeals, with remand to the District Court for further proceedings. In the last-mentioned appeal, the Court of Appeals decided favorably to the petitioner the only issue which had been framed and litigated before it, stating:

> "If the corporation does not have a representative within the District who is a 'resident general agent' the statute does not require the corporation to procure and designate an agent of that description."

Assuming, on the basis of the foregoing portion of the Court of Appeals' decision that it would be granted a license on filing an application therefor, petitioner filed an

application dated June 1, 1961 for a current motor fuel importer's license (Infra, app. p. 46A to 50A). The respondents, through the corporation counsel, advised petitioner that its application was unsatisfactory in that the petitioner had not complied with the requirement, introduced into the license application form after the decision of the Court of Appeals, of stating the address of a local office or place of business in the District of Columbia. The new requirement imposed by the District presumably derived from a statement in the Court of Appeals' opinion of May 25, 1961, to the effect that:

> "However, considering the nature of the business of importing motor fuel, the supervision of such business intended by the Motor Fuel Tax Law, and the Article 26 Regulation referred to above, the importer, to qualify for a license, is required to designate a local representative and maintain a local office or place of business within the District of Columbia. In the absence of an agent known as a 'resident general agent', compliance with the licensing statute requires the designation in the application of such a representative as the regulation specifies. We think this is a reasonable construction of the statute. It avoids giving the reference to a 'resident general agent' a construction which requires an agent of that precise description, while at the same time it does require a local representative of requisite authority to be designated and specified in the application for a license." (Infra, app. p. 69A to 70A).

Thereafter, on the basis of discussions with and suggestions from the respondent's Corporation Counsel, the petitioner filed a revised application dated August 16, 1961. Although it was initially indicated that this application would be accepted by the respondents, it was ultimately rejected. (Infra, app. p. 46A to 49A).

To remove the decisional obscurity resulting from the last-quoted portion of the Court of Appeals' opinion, petitioner, on June 20, 1961, moved the Court of Appeals for

a rehearing and to recall and to stay the judgment so as to clarify the opinion. The Court of Appeals denied such motion.

Thereafter, on October 4, 1961, petitioner moved in the District Court for an order, pursuant to the judgment of the Court of Appeals, to compel the respondents to issue a motor fuel importer's license to it for the year beginning July 1, 1961, pursuant to the current license application which had been filed by petitioner and, on the hearing of the motion, requested a trial if the Court should deny the motion to direct the issuance of the license. (Infra, app. p. 45A).

The District Court, by order dated November 28, 1961, denied this motion and, *sua sponte,* made an order dismissing the action, and dissolved the injunction which previously had preserved the right of petitioner to import motor fuel in the District of Columbia pending the final disposition of the case. (Infra, app. p. 72A to 73A).

The Court of Appeals on May 31, 1962 affirmed the opinion of the District Court, holding that the last-quoted portion of the Court's decision in the earlier appeal established the law of this case even though the holding in the earlier appeal had been in petitioner's favor on the single clear question that had been framed and litigated in said appeal. (Infra, app. p. 75A to 76A). On June 1, 1962, petitioner moved the Court of Appeals to stay the mandate and applied for an injunction pending this petition for certiorari. The motion to stay the mandate was granted on June 12, 1962. (Infra, app. p. 77A). The application for the injunction pending certiorari was denied on June 22, 1962. (Infra, app. p. 78A).

At no time has petitioner been granted a trial on the merits; there has been no determination of the question raised by the petitioner of the constitutionality of the requirement that an applicant for a District of Columbia motor fuel importer's license have a resident general agent or an office or place of business in the District.

REASONS FOR GRANTING THIS WRIT

I.

There has been a departure from the accepted and usual course of judicial proceedings amounting to a denial of due process in the dismissal of this case, *sua sponte*, without challenge of the sufficiency of the complaint and without trial and without disposition of the constitutional question raised with respect to the application of a provision of the District of Columbia Code and of a Regulation promulgated thereunder.

Apart from dismissal for non-prosecution, there are but two ways in which a law suit may be determined; dismissal of the complaint for insufficiency, and dismissal after trial or after the equivalent of trial, as by motion for summary judgment. In the instant case, a dismissal of the complaint was directed, apparently on the merits, notwithstanding the fact that there has been no claim or finding of insufficiency of the complaint and no trial nor disposition by summary judgment. Judicial procedure has been formulated over many centuries for the purpose of affording litigants due process of law in the adjudication of their rights and grievances, and conformity to established procedure goes to the very essence of due process. *Snyder* v. *Massachusetts* (1934) 291 U. S. 97, 78 L. Ed. 674, 54 S. Ct. 330; *Powell* v. *Alabama* (1932) 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55; *Blackmer* v. *United States* (1932) 284 U. S. 421, 76 L. Ed. 375, 52 S. Ct. 252; *Mullane* v. *Central Hanover Bank & Trust Co.* (1950) 339 U. S. 306, 94 L. Ed. 865, 70 S. Ct. 652; *Galpin* v. *Page* (1873) 18 Wall 350, 21 L. Ed. 959; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.* (1933)

289 U. S. 266; 53 S. Ct. 627, 77 L. Ed. 1166; *L. B. Wilson Company, Inc. v. F.C.C.* (1948) 170 F. 2d 793, 83 U. S. App. D. C. 176.

In the instant case the petitioner has at all times asserted two grounds for relief: first, that the District of Columbia Code did not require it to have a resident general agent as a prerequisite to obtaining a motor fuel importer's license; and, second, that if the statute be construed to impose such a requirement, the same would be unconstitutional because it is arbitrary and in no way related to the purposes and administration of the statute. As is shown in the affidavit appearing at pages 22A to 31A of the Appendix, the District of Columbia at no time had any dealings of any nature whatsoever in the District of Columbia with any resident general agent of any motor fuel licensee. This proof, obtained by pretrial deposition from the respondents themselves, clearly shows the substantiality of the constitutional question which the petitioner was prepared to document by proof at a trial. This same evidence indicates also the substantial proof which could be adduced on a trial by petitioner to prove the arbitrariness and lack of relation to administrative function of the requirement, suggested and then affirmed by the Court of Appeals, that foreign corporation motor fuel licensees have an office or place of business in the District.

Further proof that would be adduced on the trial that up to now has been denied petitioner would be the circumstance that the respondents' new-found interest in having resident general agents or local offices within the District of Columbia comes, not from considerations of administrative necessity or convenience to have the importers' representatives located in the District of Columbia but, rather, from respondents' desire to use the requirement as a means of denying franchise tax exemption which would

otherwise be available to a non-resident foreign licensee under District of Columbia Code 47-1551c(h) (1951).

Petitioner established without contradiction in pre-trial proceedings that prior to its being granted an exemption from franchise taxes by the District Court, which was affirmed in *District of Columbia* v. *Cities Service Oil Company* (1958) 103 U. S. App. D. C. 332, 258 F. 2d 426, the respondents had no interest in the nature of the representative that petitioner had within the District of Columbia. It was only after petitioner established an exemption from franchise tax that respondents became vitally interested that petitioner maintain a resident general agent in the District.

Additional highly significant proof that respondents have no bona fide requirement of a resident general agent or local office in connection with the administration of the statute is found in the circumstance that respondents granted licenses to foreign corporations who named as resident general agents well-known corporate service companies, who function only as agents for service of process, while denying a license to petitioner which named the self-same type of corporate agent for service of process in its application.

Due process requires that litigated matters be disposed of in accordance with established procedure. It is submitted that "short-cuts" in this area are inappropriate and certainly that they are altogether without justification when they foreclose a party from the opportunity of having a trial and offering proof of a constitutional question as to which a record showing of substantiality has already been made. *Akron, C. & Y. Railroad Co.* v. *United States* (1922) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270; *B & O Railroad Co.* v. *United States* (1936) 298 U. S. 349,

80 L. Ed. 1209, 56 S. Ct. 797; *Holmes* v. *Conway* (1916) 241 U. S. 624, 60 L. Ed. 1211, 36 S. Ct. 681; *Truax* v. *Corrigan* (1921) 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254. In the instant case the petitioner explicitly raised the due process question before the District Judge and requested the right to go to trial on the question. The answer of the District Judge was, "I am not going to try that issue". (Infra, app. p. 59A). Due process recognizes no right in a Court to refuse to try an issue. If the issue is without legal substance it may be dismissed for insufficiency; if it withstands such attack; then it may be dismissed only after the trier of the fact finds the proof insufficient to sustain it. In the instant case there has been such a departure from accepted judicial procedure as to constitute a violation of due process and require the intervention of the United States Supreme Court.

II.

The Court of Appeals, in suggesting a new administrative requirement not urged by the administrative agency or in issue in the litigation, improperly departed from the judicial function and entered the area of the administrative function.

Simply stated, a Court is supposed to resolve issues, not create them. In the instant case, there was only one issue before the Court of Appeals when it made its decision of November 14, 1961. *Cities Service Oil Company* v. *McLaughlin, et al.*, (1961 App. D. C.) 292 F. 2d 759. This issue—whether an applicant for a motor fuel importer's license was required to have a resident general agent in the District of Columbia—had been framed by the Court

itself and repeatedly stated by the respondents as the sole question in the case. (Infra, App. p. 67A). It was the duty of the Court of Appeals to pass on the District Court's disposition of this issue in the order before it for review. Had the Court performed this function without going further, this case would now be at rest. Instead, after deciding the sole question of the case favorably to the petitioner, the Court of Appeals proceeded to advance a new administrative requirement—that the licensee have an office or place of business in the District—which had at no time theretofore been imposed by the administrative agency. The suggestion contained in the Court's obiter dictum was quickly adopted by the administrative agency, with the consequence that a new case, within the original case, actually eventuated. In other words, after the petitioner had prevailed on the issue of its right to receive an importer's license without designating a resident general agent, it found itself confronted, in the same litigation, with the Court-created issue of whether it was required to have an office or place of business in the District as a condition of obtaining its license. It is not the function of the Courts to generate new questions and protract litigation, but, rather, to decide the issues of each case as framed by the parties themselves. The rule is clearly stated by this Court in *Mills* v. *Green* (1895) 159 U. S. 651, 40 L. Ed. 293, 16 S. Ct. 132, as follows:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

Had the Court of Appeals followed its judicial duty in the manner above stated, it would have limited its determination to deciding, as it did, that the appellant was not required to have a resident general agent as a condition of obtaining a license. From this decision of the actual controversy between the parties there would have eventuated "a judgment which can be carried into effect", that is, a judgment directing the respondents to issue a motor fuel importer's license to the appellant. Instead, when the Court of Appeals undertook to give an opinion on an abstract proposition and "to declare principles or rules of law which cannot affect the matter in issue in the case before it", as it did by gratuitously advancing the proposition that appellant is required to have an office or place of business in the District, it issued a determination which self-evidently could not be cast into a judgment granting or denying a license, as the parties were not in controversy over any requirement of having an office or place of business in the District. In effect, the Court of Appeals assumed the role of the administrator in suggesting the new requirement. The reality of this and the litigation complication ensuing therefrom are made amply clear when it is seen that, immediately after the utterance of the Court's dictum, the respondents modified their application form to require what they had never theretofore required—a statement of the applicant's office or place of business in the District.

Thus, in a case which was actually finally determined and in a posture for final judgment, there was created a new issue—a case within a case—as the direct consequence of the Court of Appeals' obiter dictum cast in the form of an administrative requirement not theretofore imposed by the administrative agency. As stated by this Court, quoting from another of its decisions, in *N.L.R.B.*

v. *Gullett Gin Company Inc.* (1950) 340 U. S. 361 at page 363, 71 S. Ct. 337; 95 L. Ed. 337:

> "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."

When the Court of Appeals in this case, after deciding that the appellant was not required to have a resident general agent and was thus entitled to a license, proceeded to point out what it conceived to be a new basis for denying a license to appellant, it doffed the judicial mantle of impartiality and, in effect, ranged itself on the side of appellant's adversary. In so doing, it renewed and protracted a litigation which, properly and legally, was then at an end. This it should not have done.

III.

An administrative agency may not, by regulation, impose a requirement transcending the requirements of the statute under the authority of which the regulation is issued.

The Court of Appeals' conclusion that an applicant for a motor fuel importer's license is required to have an office or place of business in the District derives from Article 26, Section 2, of the Police Regulations of the District of Columbia, which purports to impose such a requirement. The regulation is issued under the authority of Section 47-1916 of the Motor Fuel Tax Law, which states that "The commissioners may make such regulations as in their judgment are necessary for the administration of Section 47-1901 to 1916 * * *." Insofar as licensure is concerned, the relevant section of the statute

is Section 47-1903(a), which imposes five specifications in respect of the application for license: (1) the name of the applicant; (2) the name under which the applicant intends to transact business and the name and place of business of the local representative; (3) the location of the applicant's place of business; (4) the date such business was established; and (5) any other information required under regulations promulgated by the Commissioners of the District of Columbia.

It is clear from the foregoing, particularly subdivision 3, that the statute contains no requirement whatsoever that an applicant for a motor fuel importer's license have a local office or place of business in the District. It is equally clear that subdivision 5 quoted above authorizes the administrative agency to require "information" by regulation, but not to impose additional requirements beyond those expressed in the statute. This Court has already spoken on the proposition of administrative action by regulation in a manner which is out of harmony with the authorizing statute. In *Manhattan General Equipment Company v. Commissioner*, (1936) 297 U. S. 129, 134, 56 S. Ct. 397, 80 L. Ed. 528, this Court said:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress but the power to adopt regulations to carry into effect the will of Congress as pressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch* v. *Tilden Product Co.*, 265 U. S. 315, 320-322; *Miller* v. *United States*, 294 U. S. 435, 439-440, and cases cited. And not only must a regulation in order to be valid, be consistent with the statute, but it must be reason-

able. *International Ry. Co. v. Davidson*, 257 U. S. 506, 514. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable."

It is submitted that the regulation which was the basis of determination by the Court of Appeals is not valid under the statute and cannot support the determination of the Court of Appeals. Further, as suggested herein, the petitioner is able to adduce proof, but has been foreclosed therefrom, to show the requirement to be unreasonable and demonstrably unrelated to the function and administration of the statute, and therefore invalid for this further reason under *Manhattan General Equipment Company v. Commissioner, id.* and *International Ry. Co. v. Davidson* (1922) 257 U. S. 506, 514, 66 L. Ed. 341, 42 S. Ct. 179, cited therein.

IV.

Obiter dictum as to matters not previously litigated cannot become the "law of the case"; nor does this principle, even if applicable, require that an erroneous determination be followed without correction.

The Court of Appeals' decision of May 31, 1962 offers no substantive justification of its decision on the prior appeal, *Cities Service Oil Company v. McLaughlin, supra.* The Court stands squarely on "the law of the case", saying:

> "Our previous decision set forth qualifications a motor fuel importer must satisfy in order to obtain a license under the statute. Our decision became the law of the case and was followed by the District

Court. The judgment of the District Court accordingly is affirmed."

The decision that the Court of Appeals says became the law of the case is one that was not susceptible of review because of its interlocutory nature. *United States of America* v. *United States Smelting, Refining and Mining Company* (1950) 339 U. S. 186, 94 L. Ed. 750, 94 S. Ct. 737.

Its own prior decision relied on by the Court of Appeals was one in which the petitioner was the successful party in that it obtained reversal of an order granting the respondents summary judgment and a dismissal of the complaint; obviously the petitioner would not and could not appeal from this determination nor could it have any review of the *obiter dictum* which, in effect, was uttered *in vacuo*.

The Court of Appeals appears to have grounded its decision herein on two premises, both of which are erroneous; first, that it laid down the law of the case when it uttered an *obiter dictum* as to a matter neither pleaded nor argued and, second, that a court is inexorably bound by the principle of the "law of the case". The first of these assumptions is interestingly refuted in an opinion by Mr. Justice Field of this Court in *Barney* v. *Winona and St. P. R. Co.* (1886) 117 U. S. 228, 231, 29 L. Ed. 858, 859, 6 S. Ct. 654, wherein he stated:

> "We said, however, that the grant of these additional sections might be regarded as one of quantity; an inadvertence for which the writer of that opinion, who is also the writer of this one, is alone responsible. The statement was not at all material to the decision, which was that a deduction should have been made by reason of the intersection of the two

grants, so far as the prior grant was located within the extension.

> "We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal on similar facts. The first decision is the law of the case and must control its disposition; but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision."

As to the question of whether the principle of "law of the case" is inexorably binding even in the face of error or so as to permit a court to ignore gross error, it suffices to quote Mr. Justice Holmes in *Messenger v. Anderson* (1912) 225 U. S. 436, 444, 56 L. Ed. 1152, 1156, 32 S. Ct. 739, wherein he stated:

> "In the absence of statute the phrase "law of the case", as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

To the same effect is *United States of America v. United States Smelting, Refining and Mining Company*, supra.

In the instant case the Court of Appeals has closed the door to substantive consideration of the correctness of the District Court's decision by stating that such decision followed the law of the case, a dictum laid down by the Court of Appeals in the prior appeal. This operates with a Kafka-like effect to deny petitioner any element of fair-play or due process. In the first instance,

the Court laid down an *obiter dictum* as to a matter that was neither pleaded, briefed, argued or so much as mentioned in the case. Then, having done this, it decided the later appeal by saying that it will take no account of the correctness or incorrectness of its earlier dictum—that it is binding as the law of the case. It is submitted that the principle of law of the case does not apply, and even if it did, it is not so immutable in application as to foreclose the correction of the judicial error which is here so manifest.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE H. COLIN
Counsel for Petitioner
60 Wall Street
New York 5, N. Y.

Of Counsel:
EDWIN J. GORDON
JACK B. JOEL
ROBERT W. THABIT